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October 29, 1997

OCT 30 1997

Office of the Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

RE: **MM Docket No. 97-182, Notice of Proposed Rulemaking** Preemption of State and Local Zoning and Land Use Restriction on the Siting, Placement and Construction of Broadcast Station Transmission Facilities

Dear Sir/Madam:

Enclosed for filing please find the original and 9 copies of the comments of the State of Vermont, Environmental Board in regard to the above referenced rulemaking petition now before the Federal Communications Commission.

Please note that this filing has been sent today in 3 envelopes using the U.S. Postal Service overnight Express Mail in order to comply with the filing deadline of Thursday, October 30, 1997.

Enclosed is an extra copy of our filing and a self-addressed return envelope. Please date stamp this copy and return it to us for our records.

If you have any questions, please do not hesitate to call me at 802-828-5444.

Sincerely,

David L. Grayck

David L. Grayck
General Counsel

Enclosures: Exhibits as labeled and extra copy of filing to be date stamped and returned

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Preemption of State and Local Zoning and	)	MM Docket No.
Land Use Restrictions on the Siting,	)	97-182
Placement and Construction of Broadcast	)	
Station Transmission Facilities	)	

To: The Commission

COMMENTS OF THE STATE OF VERMONT ENVIRONMENTAL BOARD

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October 29, 1997

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SUMMARY

The State of Vermont Environmental Board is responsible for the implementation and interpretation of Vermont's state-wide environmental land use law. No preemption is necessary to achieve the rapid implementation of DTV service and spectrum recovery under § 336(c) of the 1996 Telecommunications Act. Rather, planning by broadcasters is the key to successful DTV roll-out.

If the Commission deems some level of preemption to be appropriate, it should not rise to the level proposed by the National Association of Broadcasters and the Association for Maximum Service Television ("Petitioners"). The Petitioners' rule (i) unnecessarily applies to all television and radio broadcast facilities, not just new DTV facilities; (ii) provides for unrealistic time frames in which land use authorities must act; (iii) creates a broadcaster self-certification process with respect to radiofrequency radiation ("RFR"); (iv) unreasonably requires the balancing of state law with regard to all other matters not expressly subject to the Petitioners' rule against the federal interest in broadcasting; and (v) seeks to improperly delegate this Commission's authority in the context of alternative dispute resolution at the broadcaster's election.

The Commission should reject the Petitioners' proposed rule and, instead, direct all broadcasters to make a good-faith effort at complying with state and local land use law.

I. INTRODUCTION

On September 24, 1997, the Vermont Environmental Board convened a public meeting to consider In the Matter of Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities, MM Docket No. 97-182, FCC 97-296, Notice of Proposed Rulemaking (August 19, 1997), which is referred to herein as the "NPR." The Environmental Board hereby files these comments with the Federal Communications Commission ("Commission") in response to the NPR pursuant to the September 24 meeting.[1] As explained below, the Environmental Board opposes any preemption of state and local land use laws with regard to digital television ("DTV") service, and all other broadcasting categories.

The Environmental Board is responsible for the implementation and interpretation of Vermont's state-wide environmental land use law. Codified at Title 10, Chapter 151 of Vermont Statutes Annotated, this law is simply known as Act 250.[2] "Vermont, through the Act 250 process, affords citizens

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[1]The Environmental Board has also filed comments in Second Memorandum Opinion and Order and Notice of Proposed Rulemaking, WT Docket No. 97-192, ET Docket No. 93-62, RM-8577 ("Wireless RF Petition").

[2]A copy of Act 250 and the Environmental Board's rules are included as Exhibits A and B, respectively. Included as Exhibit C is a brief description of Act 250's ten criteria and the Act 250 hearing process, and a copy of the Environmental Board's Twenty-fifth Anniversary Report.

the chance to participate in the review of certain development before that development occurs."[3]

While allowing for citizen participation, Act 250 nevertheless was "specifically written to control development, not to stop development" such that Vermont has enjoyed "economic prosperity through balanced environmental protection."[4] Because of Act 250, "Vermont's environment--as well as the growing tourist economy which is linked to the health and beauty of that environment--has benefitted greatly from this exercise of local control."[5] The Environmental Board clearly understands that Vermont "must not be left out of technological advances," but at the same time, Vermont's economic and environmental well-being depends on Vermont not being "turned into a giant pincushion with 200-foot towers indiscriminately sprouting on every mountain and in every valley."[6]

As explained below, no preemption is necessary to achieve the rapid implementation of DTV service and, consequently, rapid

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[3]Letter of October 22, 1997 by Governor Howard Dean, M.D., to the Commission filed in the Wireless RF Petition.

[4]Letter of October 24, 1997 by United States Senator James M. Jeffords filed in the Wireless RF Petition.

[5]Letter of October 24, 1997 by Congressman Bernard Sanders filed in the Wireless RF Petition.

[6]The Comments of United States Senator Patrick Leahy of October 22, 1997 filed in the Wireless RF Petition and this NPR.

spectrum recovery under § 336(c) of the 1996 Telecommunications Act ("Act").

Even if the Commission deems some level of preemption to be appropriate, the rule proposed by the National Association of Broadcasters and the Association for Maximum Service Television ("Petitioners") far exceeds that which is necessary and reasonable to achieve rapid, nation-wide DTV service and spectrum recovery. The Petitioners' rule (i) unnecessarily applies to all television and radio broadcast facilities, not just new DTV facilities; (ii) provides for unrealistic time frames in which land use authorities must act; (iii) creates a broadcaster self-certification process with respect to radiofrequency radiation ("RFR"); (iv) unreasonably requires the balancing of state law with regard to all other matters not expressly subject to the Petitioners' rule against the federal interest in broadcasting; and (v) seeks to improperly delegate this Commission's authority in the context of alternative dispute resolution at the broadcaster's election.

II. THE PETITIONERS' PROPOSAL PORTENDS A RETURN TO UNCHECKED COMMISSION PREEMPTION

The Petitioners' proposal at NPR Appendix B is not supportable under the controlling United States Supreme Court precedent. Adoption of the Petitioners' proposal would be tantamount to a return to "unchecked" Commission preemption, regardless of whether the proposal is defended as a function of

Congress having preempted state law through the enactment of § 336(c), or the Commission preempting state law through the promulgation of its own regulations.[7] The Petitioners' rule improperly ventures "far into state territory" without any support in the language of § 336(c), or in its legislative history.[8]

The Joint Explanatory Statement of the Committee of Conference, House Conference Report No. 104-458, treats § 336(c) in a single paragraph in the context of the House amendment discussion. The conference agreement treatment is limited to two sentences:

> The conference agreement retains the requirement in the House amendment that the Commission condition the issuance of a new license on the return, after some period, of either the original broadcast license or the new license. However, the conference agreement leaves to the Commission the determination of when such

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[7]Zpevak, FCC Preemption After Louisiana PSC, 45 Federal Communications Law Journal 185, 190 (1993). See Louisiana Public Service Commission v. FCC, 476 U.S. 355, 368-369, 106 S.Ct. 1890, 1898-1899 (1986) (Congress can be understood to have preempted state law in a number of ways; a federal agency acting within the scope of its congressionally delegated authority may also preempt state law by its own decisions).

[8]Nadler, Give Peace a Chance: FCC-State Relations After California III, 47 Federal Communications Law Journal 458, 459 (1995). While this article pertains to telecommunications and not broadcasting, the Commission should carefully consider the article's description of Commission-state conflict when evaluating the Petitioners' rule. Specifically, it discusses an over-confident Commission venturing far into state territory and then being unable to withstand the inevitable state counter-attack.

> licenses shall be returned and how to reallocate returned spectrum.[9]

The Petitioners' sweeping proposal to preempt traditional state regulation over health, safety, and aesthetics is not a reasonable accommodation with the subject matter that Congress committed to the Commission's care pursuant to § 336(c). In addition, the legislative history to § 336(c) indicates that the Petitioners' proposed rule is not one that Congress would have sanctioned.[10]

Likewise, the Commission should not sanction the Petitioners' proposed rule. If the Commission adopts the Petitioners' proposal, then it *will* become unnecessarily involved in local land use disputes regarding tower placement.[11] As the Commission states at NPR ¶ 16:

> There are now over 12,000 radio and 1,500 television station licenses outstanding, totals which suggest that generally compliance with state and federal laws relating to broadcast station construction and operation has been possible and that regulation has not been an insuperable obstacle to the exercise of the Commission's "powers to promote and realize the vast potentialities of radio."

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[9]1996 U.S. Code Cong. & Admin. News, Vol. 4, Legislative History, 173-174.

[10]See City of New York v. Federal Communications Commission, 486 U.S. 57, 64, 108 S.Ct. 1637, 1642 (1998) (citing United States v. Shimer, 367 U.S. 374, 383, 81 S.Ct. 1554, 1560 (1961)). See also Fidelity Federal Savings and Loan Association v. De La Cuesta, 458 U.S. 141, 154, 102 S.Ct. 3014, 3022 (1982).

[11]NPR at ¶ 15.

If even a quarter of these 13,500 licensees construct facilities under the Petitioners' proposed rule, then the Commission will become a national zoning board of appeals. Local communities will find themselves with no authority to regulate their own affairs and their only recourse will be to petition this Commission.

While the Commission has preempted state and local laws pertaining to individual citizen use of satellite "dish" antennae without becoming a national zoning appeal board, there simply is no comparison between a personal use dish antenna and a television or radio broadcasting facility.[12] Moreover, there is no comparison between an individual's resources to contest a land use law with regard to a dish antenna and a broadcaster's resources to comply with state and local land use laws.[13] It is reasonable for this Commission to expect that broadcasters will always need to expend resources to locate facilities that are consistent with state and local law.

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[12]NPR at ¶ 15.

[13]C.f. Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. 95-59, 11 FCC Rcd 5809, 5812 (1996), wherein industry representatives alleged that preemption was necessary, in part, because the examples cited in the record were only those cases where the private citizen antenna user had sufficient funds and perseverance to fight local regulations and capture the attention of the companies and associations filing comments.

III. ANALYSIS OF PETITIONERS' PROPOSED RULE

i. The proposal unnecessarily applies to all broadcasters.

The Petitioners' proposed rule would virtually negate meaningful state and local land use review of *all* broadcast facilities because it applies to the siting of new broadcast transmission facilities, and the alteration or relocation of existing broadcast transmission facilities, regardless of whether the facility will be used for DTV service. For Vermont this would mean that a broadcaster could construct a tower without having to comply with Act 250, and then seek tenants such as television and radio stations, or personal wireless service providers who also would avoid Act 250 review. This would be contrary to § 336(c) since that section pertains exclusively to DTV licensing.

For example, in Re: Stokes Communications Corporation and Idora Tucker, #3R0703-EB, Findings of Fact, Conclusions of Law, and Order (Dec. 13, 1993), aff'd, 164 Vt. 30, 664 A.2d 712 (1995), the Environmental Board issued a permit for the replacement of a 120-foot tower by a 300-foot tower to Stokes Communication Corporation (WCVR-FM).[14] The permit also authorized antennae for cellular telephone service. The tower was to be equipped with two 620-700 watt red lights flashing at approximately 30 flashes per minute, and two 116-125 watt red lights. On a clear night, these lights would be seen up to 20

[14]The Environmental Board's decision is included as Exhibit D.

miles away, as well as most prominently from within a number of surrounding residences. The permit required the installation of light shields to mitigate the undue adverse effect on aesthetics which would result from the tower's lights in the nighttime sky.

The Environmental Board's findings of fact were that the Commission had authorized this project, and that the Federal Aviation Administration required such lighting. Accordingly, if the Commission was to adopt the Petitioners' proposed rule, then this project could be built without the Act 250 permit light shield requirement, even though this project is completely unrelated to DTV service.[15] Even if this project was related to DTV service, there is no reason why a broadcaster should object to a lawful light shield requirement, nor does § 336(c) provide any basis for the preemption of such a requirement. The Commission should not adopt any rule which would preempt the consideration of aesthetic issues.

ii. The proposal establishes unrealistic time frames in which land use authorities must act.

The Petitioners' rule proposes a twenty-one, thirty, and forty-five day framework during which a land use authority must "act" on an application, depending upon what type of project is being proposed. Any decision must be "delivered" within five (5)

[15]In affirming the Environmental Board's light shield requirement, the Vermont Supreme Court concluded that such requirement was not preempted by the FAA's regulations. Stokes, 164 Vt. at 38. A copy of the Vermont Supreme Court's decision is included as Exhibit E.

days. These are unreasonable time frames if there is going to be meaningful review of these projects under state and local laws such as Act 250.

An Act 250 application is processed as a contested case under Vermont's Administrative Procedure Act ("APA") and, as such, a reasonable amount of time is required to comport with the requirements of procedural due process.[16] Parties are entitled to a reasonable opportunity to prepare their cases, offer evidence at hearings, conduct cross examinations, and provide written memoranda. Likewise, those who rule on the Act 250 permit applications and appeals need a reasonable amount of time to consider the evidence and issue written decisions which contain findings of fact and conclusions of law. As this Commission well knows, this type of process requires a reasonable amount of time in which to occur.

The Act 250 program understands that it has a general obligation to be timely in its review of broadcast and communication tower applications, and that these types of projects have certain unique characteristics. The time it takes to process an Act 250 permit application in large measure depends upon the quality of the supporting application materials. Therefore, the Environmental Board has adopted its own specialized broadcast and communication facility application form. This form

[16]See In re Vermont Health Service Corporation, 155 Vt. 457, 460, 586 A.2d 1145 (1990).

allows for a more expedited and through review of the broadcast or communication facility.[17]

After an application is filed, a determination is made as to whether it is a "minor" or "major" application. If it is a minor application brought under EBR 51, such as the installation of additional antennae or microwave dishes, then no hearing is held and a permit is likely to be issued within 60 days of the filing of the application.

For example, the following is the permitting history for WNNE-TV, Inc., which is the only non-Burlington, Vermont commercial television station receiving a digital television channel assignment. WNNE-TV has received permits for both minor and major projects, and there have been no appeals during the entire permitting history:[18]

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[17]The specialized application form was adopted pursuant to Re: Petition for Rulemaking by Edward H. Stokes, Decision Regarding Request to Initiate Rulemaking (Oct. 9, 1996). The specialized application form is attached as Exhibit F.

[18]WNNE-TV broadcasts from a facility located on Mount Ascutney, in Windsor, Vermont on channel 31. The land is owned by the State of Vermont, Department of Forests, Parks & Recreation and leased to WNNE-TV. In addition to WNNE-TV, non-commercial Vermont ETV, Inc. broadcasts from Mount Ascutney on channel 41, WVTA. This is also a DTV channel assignment.

Permitting History for WNNE-TV, Channel 31, Hartford, Vermont

1.	Permit:	#2S0384
	Permittee:	Taft Broadcasting Corp.
	Project:	24' X 44' communications equipment building and a 124' guyed tower.
	Application filed:	5/1/78
	Application complete:	5/1/78
	Type:	Major
	Hearing held:	5/19/78
	Permit issued:	5/24/78
	Appeal:	No
2.	Permit:	#2S0384-1
	Permittee:	Taft Broadcasting Corp., Northern New England Television (WNNE)
	Project:	Install three-phase power via overhead lines using existing poles.
	Application filed:	6/1/78
	Application complete:	6/1/78
	Type:	Minor
	Permit issued:	6/28/78
	Appeal:	No
3.	Permit:	#2S0384-2
	Permittee:	Taft Broadcasting Corp., WNNE-TV
	Project:	Extend construction completion deadline.
	Application filed:	10/4/78
	Application complete:	10/4/78
	Type:	Minor
	Permit issued:	10/17/78
4.	Permit:	#2S0384-3
	Permittee:	Taft Broadcasting Corp., WNNE-TV
	Project:	Construction of up to 85' microwave tower with cable tray to permitted building.
	Application submitted:	11/17/80
	Application complete:	11/17/80
	Type:	Major
	Hearing held:	12/23/80
	Permit issued:	1/20/81
	Appeal:	No

5.	Permit:	#2S0384-4,
	Permittee:	Taft Broadcasting Corp., WNNE-TV, and Young's Cable TV
	Project:	Reconstruct lower 40' of WNNE-TV tower for installation of up to 8 microwave antennae on the tower.
	Application filed:	4/15/87
	Application complete:	4/15/87
	Type:	Notice as Minor, request for hearing filed
	Hearing held:	5/26/87
	Permit issued:	6/12/87
	Appeal:	No
6.	Permit:	#2S0384-10
	Permittee:	Contact Communication, Inc., and WNNE-TV
	Project:	Attach a 24-inch dish antenna to an existing pipe on the WNNE building at approximately 15 feet, and a 15 foot whip antenna on the WNNE-TV tower at approximately 65 feet.
	Application filed:	7/6/93
	Application complete:	7/6/93
	Type:	Major
	Hearing held:	7/30/93
	Permit issued:	8/25/93
	Appeal:	No

As this permitting history demonstrates, the Act 250 program can process applications for broadcast projects in an efficient manner, regardless of whether the project is a minor or a major. Nevertheless, the time frames proposed by the Petitioners are unrealistic and will not allow for meaningful review in all instances, especially where there is an appeal.

For example, in the Stokes case, the original application was filed on July 6, 1992, and a permit was issued on August 25, 1992. There was an appeal by neighbors on September 22, 1992. The Board issued its decision on December 13, 1993. Sub-

sequently, the permittee appealed the light shield requirement to the Vermont Supreme Court which issued its decision on July 1, 1995.

The Stokes case involved a number of difficult preliminary and substantive issues. These issues required legal memoranda, oral argument, and formal memorandum of decisions by the Environmental Board. The Environmental Board could not have fulfilled its obligations under Vermont's APA and Act 250 if it had been constrained by the deadlines which the Petitioners' propose. The Commission should be respectful of state and local land use laws which are administrative procedure contested cases. The introduction of DTV service under § 336(c) does not warrant preemption of Act 250 and Vermont's APA, nor is such preemption warranted nation-wide.

iii. The proposal establishes broadcaster self-certification with respect to radiofrequency radiation.

The Petitioners' proposed rule would eliminate Act 250 jurisdiction with respect to RFR to the extent that a facility complies with this Commission's regulations. Again, this would apply to all facilities, and not just DTV facilities. This is tantamount to broadcaster self-certification.

Presumably, a broadcaster would simply file a copy of its Commission license as part of its Act 250 permit application to establish that the proposed project complies with the Commission's broadcaster RFR regulations. This submission would

then cause Act 250 review to be preempted under the Petitioners' proposed rule.

Presently, the Environmental Board understands that it is not preempted to consider RFR under Act 250 with regard to broadcast facilities.[19] Under Act 250's burden of proof allocation, it is the applicant's burden to demonstrate compliance with 10 V.S.A. § 6086(a)(1)(undue air pollution). Typically, this is done through a combination of documentary evidence such as a Commission license, equipment specifications, and testimony by an applicant's site technician. In some cases, emission measurements are provided to address the RFR issue. Opponents are allowed to come forward with their own evidence to demonstrate non-compliance.

The Commission should not adopt any rule which would preempt Act 250 review over RFR. If the Commission adopts a preemption rule similar to that which applies to personal wireless service providers, then the Commission should not place any limitation on what evidence is relevant to the issue of compliance with the Commission's broadcaster RFR guidelines.

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[19]The Environmental Board understands, as stated in its comments on the Wireless RF Petition, that it is conditionally preempted to consider RFR with respect to personal wireless service providers. Accordingly, the Environmental Board strongly disagrees with the reply comment of Ameritech Mobile Communications, Inc., in the Wireless RF Petition, that the Environmental Board has a "misperception" regarding the scope of its authority.

The Environmental Board believes that Act 250 and Vermont's APA establish sufficient evidentiary protection so that only relevant evidence will be considered with regard to RFR emissions. The Commission should not interfere with the Act 250 quasi-judicial process by prescribing what evidence is relevant and admissible with regard to RFR in each and every case. The Environmental Board believes that site-specific conditions should dictate what information is relevant to the consideration of RFR.

For example, on Burke Mountain, in Burke, Vermont, it was determined that the cumulative impact of successive multiple users on a tower located in a recreational area could cause the applicable ANSI/EE standards to be exceeded. One of these users includes a television station.[20] As a remedy, a master plan was required to ensure a safe level of RFR emission.[21] In each case, state and local land use authorities should be free to look at all of the contributors of emissions in determining whether there is preemption of concerns related to RFR.[22]

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[20]Vermont ETV, Inc., broadcasting as WVTB on channel 20, St. Johnsbury, Vermont. This is a designated DTV channel assignment.

[21]A copy of the district environmental commission decision is included as Exhibit G.

[22]The Environmental Board agrees with the Commission that it is preempted with respect to radiofrequency interference.

iv. There should be no balancing of state law with regard to all other matters not expressly subject to the Petitioners' proposed rule.

The Petitioners' rule seeks to implement a balancing test between health or safety objectives other than those expressly provided for in the rule and the federal interest in broadcast transmissions. Presumably, every time a broadcaster receives an adverse decision on any issue, the result could be a petition to this Commission. If such a rule is adopted, then this Commission *will* become a national zoning appeal board. The Environmental Board strenuously objects to having to justify every provision of Act 250.

For example, in Mount Mansfield Television, Inc. and University of Vermont, #5L0759-6, Findings of Fact, Conclusions of Law, and Order (Sept. 20, 1996), the proposed project was a sewage system serving the WCAX-TV transmitter building on Mount Mansfield, Vermont's highest peak. Under the Petitioners' proposed rule, this Commission could have been asked to balance the appropriateness of an intermittent sand filter for a 1,500 gallon septic tank for human waste against the federal interests in broadcasting. Clearly, such a petition does not deserve any of this Commission's resources. Furthermore, such a petition is far outside of this Commission's area of expertise and interest.[23]

[23]A copy of the decision is included as Exhibit H.

v. The proposal's alternative dispute resolution provision is solely an attempt to avoid this Commission's declaratory ruling process at the broadcaster's election.

The Petitioners' proposed alternative dispute resolution mechanism would result in this Commission's abdication of its responsibility to exercise its jurisdictional authority over broadcasting. While the Environmental Board is supportive of alternative dispute resolution, and in fact makes it available with respect to Act 250 applications and appeals, this Commission should not adopt any rule which allows a broadcaster to elect dispute resolution without an opponent's agreement to engage in such a process. Moreover, this Commission should not be bound by an arbitration decision only when that decision is favorable to the broadcaster.

IV. THE KEY TO SUCCESSFUL DTV ROLL-OUT IS BROADCASTER PLANNING

The Commission should resolve this NPR by mandating that broadcasters plan for the implementation of DTV service well in advance of this Commission's deadlines. State and local land use laws will always force broadcasters to address fundamental issues such as whether a facility is safe; whether it will diminish significant scenic and aesthetic resources; whether it will lead to future growth in conservation areas by bring electricity to undeveloped mountain tops; and whether the broadcaster can collocate on an existing tower. These are the issues which are common to all Act 250 proceedings where the applicant proposes a

facility for television, radio, or personal wireless services. The key to successfully addressing these issues for all of the Commission's licensee categories is to plan how to comply with state and local laws.

In Vermont, under Criterion 10 of Act 250, local and regional plans provide guidance as to land use patterns. If a plan is specific, then an Act 250 permit may be denied where the applicant fails to comply with the provision.[24] The Environmental Board recently denied an application for an Act 250 permit where the broadcaster failed to comply with the regional plan's requirement that new tower construction be preceded by a good-faith effort to collocate on an existing tower. The Board stated:

> Collocation if executed properly will greatly mitigate the environmental impacts associated with the rapidly developing sector of the economy involving tele-communications, wireless services, and broadcasting. The Board acknowledges that the benefits of a highly developed communications infrastructure are essential to economic growth within the state. The Board concludes, however, that given the Applicants' almost singular focus on the Bemis Hill site, they have not paid adequate regard to the Regional Plan's admonition discouraging the development of new sites for transmission and receiving stations in favor of utilizing existing facilities. Leaving aside the question of whether Bemis Hill is a technically feasible site for the transmission of an FM station to Walpole, New Hampshire, the Board concludes that the Applicants have not fulfilled their obligation to

[24] See 10 V.S.A. § 6086(a)(10); In re Molgano, 163 Vt. 25, 653 A. 2d 772 (1994); In re Green Peak Estates, 154 Vt. 363, 577 A.2d 676 (1990).

> explore opportunities to locate the FM transmitter on an existing facility.[25]

The Savoie decision reasonably denied a permit application for a new broadcast tower without the frustration of federal law. The Savoie decision vindicates the local community decision that before a new tower is built, the applicant must make a good-faith effort to collocate on an existing tower. In contrast to what happened in Savoie, is the ongoing successful Act 250 management over Mount Mansfield.

In 1978, the Environmental Board issued a permit for a new broadcast facility on Mount Mansfield. Key issues with regard to this facility were the health and safety consequences of having high-powered broadcast facilities in close proximity to recreational users of the mountain top; the fragile condition of the mountain top's environment; and the aesthetic appearance of towers on Vermont's highest peak. As a result of this decision and subsequent decisions, the Mount Mansfield Collocation

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[25] Re: Gary Savoie d/b/a WLPL and Eleanor Bemis, #2W0991-EB (Reconsideration), Findings of Fact, Conclusions of Law, and Order at 27 (Aug. 27, 1997). A copy of this decision is included as Exhibit I. The Environmental Board urges the Commission and its staff to read this decision as it evidences the Act 250 program's commitment to understanding its obligations under federal law when considering projects under Act 250.

Association ("Association") has been formed to manage and protect one of Vermont's most significant landmarks.[26]

Presently, three of the four Burlington, Vermont television licensees and permittees receiving digital television channel assignments pursuant to the Fifth Report and Order, Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, MM Docket No. 87-268 ("Fifth Report and Order"), are located on Mount Mansfield.[27] The Association is pursuing master plan permit approval under Act 250 which provides for the implementation of DTV service from Mount Mansfield.

The Association issued a request for proposal ("RFP") in early 1996 as the first stage in the DTV planning process. Bearing in mind that the Commission was, at that time, in the latter stages of deciding upon the ATV standard and the timetable for conversion to the new standard, the RFP foresaw that this

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[26]See Re: Karlen Communications, Inc., #5L0437-EB, Findings of Fact, Conclusions of Law, and Order (Aug. 28, 1978); and Re: University of Vermont and State Agricultural College, Declaratory Ruling #116 (June 25, 1980). The Association consists of the Mt. Mansfield Co., University of Vermont, Mt. Mansfield Television, Inc. (WCAX-TV), Vermont Educational Television (WETK), U.S. Broadcast Management, LL.C (WVNY), and the State of Vermont Department of Public Safety.

[27]They are: WCAX-TV, WVNY, and WETK. The fourth licensee/permittee is WFFF-TV, Champlain Valley Telecasting, Inc. See Fifth Report and Order at Appendix E, page 57. For the entire state of Vermont, there are four commercial stations which are DTV licensees/permittees. The single public television station that is a DTV licensee/permittee has four locations from which it transmits the identical signal. The only other commercial station that is a DTV licensee/permittee is WNNE-TV, Inc., in Hartford, Vermont.

conversion would require the three television stations on Mount Mansfield to duplicate their facilities through a transition period with the subsequent dismantling of their NTSC facilities once NTSC broadcasting terminates. The RFP states:

> The FCC has made clear its intent to recover the spectrum currently used for NTSC broadcasting and reallocate it to new uses and users. This is expected to produce new demands for facilities on Mt. Mansfield. It is the intent of this project to:
>
> * Provide for construction of ATV facilities for the three television stations within the Collocation Area.
>
> * Ascertain the feasibility of constructing a fourth NTSC station (Channel 44), its ATV facility, and the ATV facility for WPTZ-TV, Plattsburgh, NY in the Collocation Area.
>
> * Ascertain whether a reduction of buildings and towers in the Collocation Area not later than the end of the ATV transition period is possible.
>
> * Ensure that there is not degradation to nor interference with critical communications systems at the Department of Public Safety site.
>
> * Accommodate current sublessee tenants in the Collocation Area sites.
>
> * Provide for orderly accommodation of new users.
>
> * Ensure that all activities occur with minimal impact to the mountain's natural environment.
>
> * Ensure that all local, state and federal regulations and standards are met, with particular reference to state environmental and federal RF standards and regulations.[28]

[28]Mt. Mansfield Telecommunication Study, Request for Proposal, Mt. Mansfield Collocation Association, at 2-3.